IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

PATRICIA VILLA, Plaintiff,	)	
v.	)	CIVIL ACTION
CAVAMEZZE GRILL, LLC, et al Defendant.	)	1:15-cv-222

REPORTER'S TRANSCRIPT

MOTIONS HEARING

Friday, November 13, 2015

BEFORE: THE HONORABLE T.S. ELLIS, III
Presiding

APPEARANCES: MATTHEW BRYCE KAPLAN, ESQ.
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THE CLERK: Patricia Villa versus Cavamezze Grill. Civil Action No. 1:15-CV-222.

THE COURT: All right.

Who is here for the plaintiff.

ATTORNEY KAPLAN: Good afternoon, your Honor.

Matthew Kaplan for plaintiff, Villa.

THE COURT: I'm sorry, your name, sir?

ATTORNEY KAPLAN: Matthew Kaplan.

THE COURT: All right.

Mr. Kaplan, good afternoon.

And for the defendant?

ATTORNEY BARMAK: Good afternoon, your Honor. For the defendant, David Barmak and my colleague, Alta Ray.

THE COURT: All right.

The hour is a bit late, so I am going to do it this way: This is a retaliation issue. I think I have in mind the parties' briefs and contentions. I am going to give you no more than 15 minutes to tell me what you think I should know that you think needs emphasis from the briefs or that -- and you'll have the opportunity, Mr. Barmak, to respond, so you better save some of your 15 minutes.

ATTORNEY BARMAK: Indeed, your Honor, I

don't think I'll need 15 minutes at all.

THE COURT: All right.

ATTORNEY BARMARK: For the most part I think we can rest on our brief. I just want to focus on the essential elements of what I think, based on the briefing, is now in dispute.

What is not in dispute are the facts central to the retaliation claim, and that is that Ms. Villa was terminated after Cava investigated her report of harassment and determined she had fabricated it, and based on that determination they fired her.

What is in dispute is a different view of the law. Plaintiff says that she gets protection because she engaged in protected activity because she, in fact, believed that what she told Cava was correct, and they say that is the only relevant issue. It doesn't matter what Cava believed.

The law, in fact, however, is that it does matter what Cava believed, that Cava had to have had retaliatory animus. In terminating her, it had to do so because it wanted to retaliate against her protected activity.

That is really the issue before the Court, and we submit respectfully that there is not much of an issue at all because the law is very clear that in

looking at the law of retaliation, while plaintiff's protected activity is a necessary condition of her claim, it is not sufficient.

She has to have engaged in protect activity, but then to be liable, Cava had to have terminated her in retaliation for that activity, i.e., as some of the cases say, with retaliatory animus.

So what do we know here based on the facts? On October 28, 2013, plaintiff told Rob Gresham, the Director of Operations, at Cava that another woman, Judith Bonilla had told her, the plaintiff, that she had been harassed by Mr. Butron. Gresham said he had would investigate that.

He did investigate it. He talked to Bonilla. Each also talked to a woman named Jessica Arias, who allegedly had been harassed as well, and to others; and based on those discussions, he concluded when Bonilla told him in a meeting not only did the harassment not occur, but I never told Pati, the plaintiff, that it had ever occurred.

He concluded that Ms. Villa had made up the allegations and that they were fabricated, and he decided to terminate her for fabricating her report. These facts are set forth in our statement of facts at paragraphs 21, 24, 36, 37, and 43, 43 being the most

salient because it says very clearly that Gresham concluded that Villa had made up the allegations and decided to terminate plaintiff for fabricating the report.

Each and every one of those statements of facts, your Honor, each and every one is undisputed by plaintiff. In their opposition, as required by the local rules, they had to address each of our statements of fact, they did that, and they acknowledged that those are the facts.

They did that because they come back and argue, "Well, it doesn't matter that you believed that she fabricated it." What really matters is whether she did, in fact fabricate it because if she didn't, then no matter what you -- Cava believed she engaged in protected activity.

THE COURT: She did engage in protected activity. There is no doubt about that.

ATTORNEY BARMARK: I think that were this case to go to trial we would -- we would dispute that, in fact, she had a good faith belief. But for purposes of this motion we grant that, that she engaged in protected activity; but, as we have addressed in our brief, the other element then, is that why she was terminated? Was she terminated for filing a report?

No. She was terminated for filing what Cava concluded was a false report.

And while plaintiffs extraordinarily claim in their papers that that's irrelevant, that the only issue was whether she engaged in protected activity, it's crystal clear that it is far from irrelevant, it is critical to know what was the causative factor and basis for Cava's decision.

The Supreme Court in Nassar ruled, unequivocally, in 2013 that the standard in retaliation cases under Title VII is a but-for test that requires a showing of retaliatory animus.

That was acknowledged in the Foster case earlier this year, in January 2015, when the Fourth Circuit said that the Nassar standard, which was a direct-evidence standard, also applies in Title VII cases under the McDonnell Douglas framework, where ultimately plaintiff must prove the same thing, that she was terminated because of retaliatory animus because of an intention by the employer to terminate her or take other adverse action based on her protected activity.

But here they have stipulated that away, as they should, because there is no evidence of retaliatory animus. They have agreed that the evidence is undisputed that the basis for the termination was not

that she filed a report, but that she fabricated the report. In order to save --

THE COURT: If you want to save three or four minutes, you better bring it to a close.

ATTORNEY BARMAK: I will do that, your Honor.

They try to save their position by nitpicking the investigation; but, again, as we cited in our papers, there are various cases that make very clear that the employer's -- the exact way the employer went around the -- about the investigations is not subject to second-guessing by the court. Here it's very clear they did do an investigation.

They got the report from both alleged victims that they had not in fact been harassed. Miss Bonilla also said she had never told Patty that. That alone provided a basis for their determination that Ms. Villa had fabricated her report.

THE COURT: All right. Mr. Kaplan.

ATTORNEY KAPLAN: I think I agree with Mr. Barmak that the central issue here is an issue of law. Their position, as I understand it, is that there can be no violation of Title VII if the defendants honestly believed that Ms. Villa's report was false. It doesn't matter how irrational, how poorly they conducted

their investigation. If that was their honest belief, according to them, there is no violation of Title VII.

That's not the law, certainly not the law in this circuit. Both the statute and the case law indicate that. If you look at 42 U.S.C. 2000e-3, which is the anti-retaliation provision, it says that, "It shall be an unlawful employment practice for an employer to discriminate against any of its employee or applicants for employment because he has opposed any practice made an unlawful employment practice by this subchapter."

There is no exception for -- if the employer thinks that the person reporting the discrimination is lying. I think courts often use the words "animus" and "retaliation," which sort of implies that there needs to be some sort of scienter, that there needs to be some kind of bad intention on the part of the person who -- part of the company that takes the unfavorable employment action.

But there is no scienter requirement. The statute is very clear, if she was dismissed because of protected activity, that's a violation of the statute.

Now, I think what the defendants miss is there can be more than one but-for cause of an event happening. Clearly, her report was a but-for cause of

her dismissal. Her report of sexual harassment was a but-for cause of dismissal. If she hadn't made that report, no dismissal would have occurred.

Maybe the defendants are right and maybe their belief, the good faith belief that she was lying, maybe that's also a but-for cause. There's no reason there needs to be one but-for cause.

Also, you know, they have cited a few cases that support their position. Those cases aren't from the Fourth Circuit. I think the Fourth Circuit is -- I'm not sure the other cases disagree with the Fourth Circuit, but we cited Peter versus Jenney, which is a 2003 Fourth Circuit case, same or very similar language is in Boyer versus Liberto.

THE COURT: What's in that case that you rely on?

ATTORNEY KAPLAN: I'm sorry?

THE COURT: What is that case.

ATTORNEY KAPLAN: Peter versus Jenney -- the language specifically is --

THE COURT: What were the facts, and what was the holding? Why do you rely on it?

ATTORNEY KAPLAN: In Boyer versus Liberto, the Court of Appeals changed previous Fourth Circuit law because it felt that it was --

THE COURT: I'm sorry. Let's go back to, you are talking about the Boyer-Liberto case in 786?

ATTORNEY KAPLAN: Yes.

THE COURT: What were the facts of that case, if you know?

ATTORNEY KAPLAN: The facts of the case, your Honor, were the issue was, I think it was --

THE COURT: I didn't ask you the issue. What were the facts of that case?

ATTORNEY KAPLAN: I believe that the plaintiff in that case alleged that there had been references to black individuals as porch monkeys, and that individual reported what had happened to her superiors. And under existing Fourth Circuit law, the initial panel that heard the of case said that that was not sufficient because she did not have a reasonable belief that those isolated remarks would establish a hostile work environment.

The Fourth Circuit --

THE COURT: Well, it's a hostile work environment.

ATTORNEY KAPLAN: It is a hostile work environment, yes, yes.

THE COURT: All right. Go on.

ATTORNEY KAPLAN: But the Fourth Circuit

said there's a very important policy issue here, and that -- the Supreme Court has said that we need to encourage people to report discrimination.

And, you know, these people made an honest report that these remarks were seemed inappropriate, and we don't want to discourage them by saying that, well, you didn't correctly apply the legal standard.

THE COURT: What, if anything, did the Boyer case say about causation?

ATTORNEY KAPLAN: The Boyer case says -- I mean, repeats some language. This is not its principal holding, but it says that the -- what Peter versus Jenney says, that the issue is whether what the employer said was subjectively --

THE COURT: That's not causation.

ATTORNEY KAPLAN: I'm sorry?

THE COURT: That's not causation.

ATTORNEY KAPLAN: You are right, your Honor. I don't think we have a dispute about causation. It has to be but-for causation.

THE COURT: All right.

Go ahead.

Finish up.

ATTORNEY KAPLAN: And, finally, I would make the argument, your Honor, that if the law were as the

defendants say the law is, no one would ever report an instance of sex discrimination or racial discrimination at work, at least if it didn't involve them because you also would have the possibility that the employer would say, "Well, we've decided that you're lying," as what's happened here.

And here I think that the facts are very clear. She was not lying. She was telling the truth. But their position is that this Court can't look beyond that, and I think you'd find it would be inconsistent with the Supreme Court's teaching in the Crawford case and other cases that the system is set up to encourage reporting of discrimination.

THE COURT: All right.

Just a couple of minutes.

ATTORNEY BARMAK: Yes, your Honor.

While I think that is true, Mr. Kaplan's last --

THE COURT: You think what is true?

ATTORNEY BARMAK: Mr. Kaplan's last comment that the system is set up to encourage complaints, there are countervailing policies. The Supreme Court addressed this in Nassar; and in Nassar they said, It's would be inconsistent with Title VII to so raise the costs, both financial and reputational, on an employer

whose actions were not, in fact, the result of any discriminatory or retaliatory intent."

So while it is true that plaintiffs are to be encouraged to make reports, it is also true that employers must make decisions based on the evidence that they have available to them can. And when they make those decisions without retaliatory intent, there can be no liability. That is clear under Nassar.

Mr. Kaplan's reference to there be several but-for causes, that's saying -- that's making this a mixed-motive case under a different guise. But the Supreme Court rejected mixed motive in Nassar. It is a but-for standard, requires retaliatory animus. They concede there was none, and that is dispositive of the case.

THE COURT: All right.

This matter is before the court on a motion for summary judgment. And defendants argue that plaintiff's concession that defendants terminated plaintiff's employment because defendant concluded that she made a knowingly false allegation of sex harassment, means that plaintiff would be unable to prove her case at trial.

Plaintiff responds that the record facts reflect that plaintiff was fired because of her

protected activity. There are undisputed facts in this case that I think are dispositive.

The two defendants, one is the parent company of the Cavamezze -- I don't know how it's pronounced, Cavamezze (pronouncing) --

ATTORNEY BARMAK: Cavamezze (pronouncing).

THE COURT: Cavamezze Grill Mosaic, which operates a restaurant in Merrifield. The parent is Cavamezze Grill, the parent company. Plaintiff was employed by the Mosaic or the Merrifield, Virginia, operation as a supervisor from February of 2013 until November of 2013.

Now, during that employment, her direct supervisor was Mr. Butron, the general manager of that facility. On October 28th of 2013, plaintiff called Mr. Gresham, the Director of Operations, for the parent company, who supervised all general managers at the subsidiaries, and reported -- Mr. Butron reported that Ms. -- I'm sorry -- plaintiff called Mr. Gresham and reported Ms. Bonilla, a former Mosaic employee, Mosaic being the store at Merrifield, told plaintiff that Mr. Butron had previously told Ms. Bonilla that he would give Ms. Bonilla a pay raise in exchange for sex.

This was a report that the plaintiff gave Mr. Gresham, and she didn't hear Butron tell the

plaintiff that. She said that the plaintiff told her Butron had said that.

Plaintiff said that Ms. Bonilla made this allegation while plaintiff, Ms. Bonilla and Mr. Marinero, another -- another Merrifield or Mosaic employee were at plaintiff's house. Plaintiff also expressed some concern that another former Mosaic employee, Ms. Arias, might have left Mosaic employ for a similar reason.

Gresham told plaintiff he would investigate these allegations, and on that very same day he reported the plaintiff's allegations -- he reported the plaintiff's allegations to the CEO, who instructed Mr. Gresham to investigate the allegations by speaking with the persons involved. He did so.

Gresham contacted Ms. Bonilla, and he had the assistance of Mr. Valdivia, a manager at the Tysons Corner Cavamezze location, and he served as an interpreter in Spanish and English.

And thereafter Mr. Gresham, Mr. Valdivia and Ms. Bonilla had a meeting in which Mr. Gresham asked Ms. Bonilla about the allegations with Valdivia translating, and Ms. Bonilla, during this investigative meeting, denied the truth of the allegations about Mr. Butron and denied that she ever made such an allegation

to plaintiff.

Now, the plaintiff notes correctly that Ms. Bonilla now recalls, that is, long after the termination of the plaintiff -- it happened in deposition -- she now recalls that she did make the allegation to plaintiff, and I'll come to the significance, if any, of that.

Mr. Gresham also contact Ms. Arias, as plaintiff had speculated in her report to Gresham that Arias might have left Mosaic as a result of sexual harassment by *Butron. Arias explained that she left Mosaic for convenience reasons and denied that Butron offered her a raise in exchange for sex.

And then Gresham also spoke with Mr. Marinero, who was also allegedly present when Ms. Bonilla made her allegation -- made her allegation to the plaintiff. Marinero didn't provide any supporting information for the allegations. Indeed, he denied ever hearing Ms. Bonilla say that Mr. Butron offered her a raise in exchange for sex.

So, based on this investigation, and especially on Arias's and Bonilla's denials of the allegations against Butron, Gresham concluded that plaintiff had fabricated the allegations, and Mr. Gresham accordingly decided to terminate plaintiff's

employment for fabricating the report against Mr. Butron.

Indeed, I think there is a statement in the briefs that the plaintiff relies on where Gresham has said that he was going to look into it, and if she had lied she would be fired, and if she hadn't lied, then he would be fired, meaning Butron. Gresham met with the plaintiff, explained his investigation, reported his conclusion, and informed her that she was terminated.

Now, to prove a retaliation claim plaintiff must prove that she engaged in protected activity, first. Second, that her employer took an adverse employment action against her, and third that there was a causal link between the protected activity and the adverse action.

No doubt that reporting allegations is a protected activity. Whether or not it was a good faith report or not, we don't come to that. We assume at this point that it was a protected activity reporting these allegations. And, of course, her termination was clearly an adverse employment action.

Now, the dispositive issue is whether the facts show a triable issue of fact on whether a reasonable jury could find causation. Now, a plaintiff can choose to proceed by direct evidence or by using --

a direct and indirect -- or by using the McDonnell Douglas burden-shifting framework. And the Fourth Circuit has said this choice is the plaintiff's choice. It's left to the plaintiff's discretion whether to proceed by direct or indirect evidence or by means of the McDonnell-Douglas burden-shifting framework. Those are words of the Fourth Circuit in the recent case of Foster against the University of Maryland at 787 Fed. 3rd.

It's an interesting rule, but it need not concern me because I think the answer in this case is the same whether one uses McDonnell Douglas or the direct-indirect means.

Here plaintiff expressly rejects reliance on McDonnell Douglas in favor of proceeding by direct and indirect; and in order to prevail by reliance on direct or indirect, plaintiff must prove not just that the defendant possessed an impermissible motive but acted on it. That's also from the Diamond case.

Causation in a Title VII retaliation case from the Supreme Court Nassar case is a but-for determination. It's not sufficient for a Title VII retaliation plaintiff to show that retaliatory animus is one of several motivating factors. Rather, Title VII retaliation must show that the unlawful retaliation

would not have occurred in the absence of the alleged retaliatory animus.

Put differently, if the same adverse action would have occurred even in the absence of the employer's wrongful retaliatory animus, then plaintiff's claim must fail. The Nassar case make this point at page 2555 at 133 Supreme Court. It says, "It is thus textbook tort law that an action is not regarded as a cause of an event if the particular event would have occurred without it."

Plaintiff's argument here, distilled to its essence, is that no investigation would have occurred but for plaintiff's protected Title VII activity. Therefore, firing plaintiff at the conclusion of the investigation is causally linked to the protected activity.

This argument must fail. It would -- the plaintiff has outlawed some of the results of going the other way; but if you went this way, then it would immunize all protected activity even if it was blatantly false, and surely that isn't the law.

Now, in drawing a causal connection between plaintiff's report and her termination, plaintiff relies on the deposition testimony from Gresham. This is where he said if the allegation is true Mr. Butron will be

terminated; but if the allegation isn't true, and you are making it up, there is a good chance somebody is going to lose their job. That's the testimony that the plaintiff relies on for causation.

And it's clear, and indeed undisputed, that plaintiff would not have been fired but for the investigation. That's true. Plaintiff points to no evidence that plaintiff would not have been fired but for retaliatory animus.

Indeed, in addition to relying on the testimony that I just quoted that actually suggest an absence of retaliatory animus, it does. It says, we are going to fire you not for reporting it. We'll fire you if it's false, and we will not fire you if it's true. We are going to fire him. So that's -- that statement is really evidence of not a retaliatory animus.

So the but-for cause of her termination was the defendant's genuine conclusion, although later shown to be erroneous, long after the event, that she made a knowingly false harassment allegation.

Accordingly, it seems to me, the plaintiff has conceded that her termination would have occurred regardless of the presence or absence of retaliatory animus. And under the Nassar case in the Supreme Court this concession is dispositive of the case and compels

summary judgment for defendants.

Now, in an attempt to avoid this conclusion, the plaintiff makes two arguments that I want to address. First, plaintiff cites the Fourth Circuit's decision in Boyer-Liberto for the proposition that plaintiff is protected from retaliation if she reasonably believed she was reporting hostile work activity.

Now, the plaintiff is correct to read Boyer-Liberto as holding that if she reasonably believed that she was reporting hostile work environment, yes, that's protected activity. But Boyer-Liberto says nothing about if she made it up. The real issue is one of causation. I think the Boyer-Liberto addresses the first prong of the retaliation claim, the meaning of protect activity, not the causation. The argument made today by Mr. Kaplan on causation I don't think accurately reflects the law.

The second point that the plaintiff makes in its brief, not so much today, was attacking the quality of the defendant's investigation; namely, the absence of written sexual harassment policy. In my view, that doesn't play a role here. It might play a role if there were a factual issue and the matter was tried, but it doesn't play a role on the summary judge analysis.

Next, Mr. Gresham's lack of training in conducting sexual assault investigations. Again, not relevant. Failure to consult an attorney, no, doesn't raise any triable issue of fact. Failure to consider that Ms. Bonilla might be reluctant to admit that her bos propositioned her for second. No. Failure to ask all of these things, Butron, whether the allegation was true, none of these raise a triable issue of fact.

Now, let me make clear that there might be cases where the adequacy of an investigation might raise a triable issue of fact. This one, in my opinion, does not. That doesn't mean that it was a great investigation because we now know that it didn't quite get to the truth. But it doesn't mean that every time there is an investigation as a triable issue of fact as to the adequacy of an investigation, there would never then be a summary judgment.

So, in my view, plaintiff's argument about the reasonableness of defendant's investigation is unavailing at this point.

Plaintiff also argues that Title VII doesn't permit an employee to terminate an employer -- beg your pardon, an employee who engaged in good-faith protected activity. This statement is overbroad. Title VII certainly prohibits firing an employee because of her

protected activity.

Moreover, plaintiff's argument suggests that whether an employee acted in good faith in engaging in Title VII protected activity is a question for the jury sufficient to survive summary judgment. That is an issue that was squarely rejected, at least by the Eleventh Circuit in the EEOC against Total System Services case at 221 Fed. 3rd. And I'll leave that discussion. I agree with it entirely, there.

Plaintiff argues today that deciding the case, as I do, discourage people from making reports. No. It doesn't. People are still protected. Now, in this case, the investigation didn't come up with the truth. She did make -- I don't know. I didn't ask and nobody has told me what since happened to Butron, but it doesn't discourage that.

It does -- it does encourage defendants to engage in a reasonable investigation, and it acknowledges that defendants ought to be able to rely on an investigation, and it certainly does not sanction or does not approve of false allegations.

If I were to accept the plaintiff's argument here, then false accusations would be immunized because any time an investigation went ahead, and defendant was fired after that, then whether the investigation was

accurate in coming up with the conclusion that the allegation was false wouldn't matter. There would still be retaliation.

So, I think I have resolved the matter in the proper fashion. The mere fact that defendant's investigation might not have been perfect does not prove that defendants acted with retaliatory animus. The Eighth Circuit in the McCulloch case has noted that the appropriate scope of investigation is a business judgment, and shortcomings in an investigation do not, by themselves, support an inference of discrimination.

And, in a similar case in the Fourth Circuit -- well, not a similar case, but in the Fourth Circuit, in a statement, the court in the Fourth Circuit reminds us that courts don't sit as kinds of super personnel department weighing the prudence of employment decisions made by firms charged with employment determinations. That case is not in point, but generally that point is true.

Here we would have to conclude that, well, you didn't do a good job on your investigation, you got the wrong answer, but we didn't have that information. The plaintiff would say, look, it's clear that you fired her because of an investigation. Well, yes. But she was fired because of what the investigation disclosed,

which at that time was that the report was fabricated.

And it's very clear that the employer would not have terminated the plaintiff if the investigation had shown the real facts. That's what Mr. Gresham said in his deposition. He said he was going to fire Butron if they were true, and he intimated -- he didn't say he would fire plaintiff if they were not true. I've forgotten what he exactly said. It would go up the line or something of that sort, but that was the implication.

So here, I think plaintiff, in effect, concedes that defendant in fact concluded that plaintiff made a knowingly false allegation -- that is not protected by Title VII -- and that defendants terminated plaintiff's employment as a result of that conclusion. In my view, that ends the matter, and there is no triable issue of fact for a jury.

Plaintiff concedes she would have been fired regardless of the defendant's retaliatory animus, which is sufficient for plaintiff to prevail under the Nassar's but-for causation requirement.

In fact, the undisputed evidence really only shows that she was fired because they concluded that it was fabricated allegation after looking into it. And the record also shows that they wouldn't have terminated her if the investigation had showed the -- had shown the

contrary.

So, in my view summary judgment is appropriate. I'll enter an order accordingly. Thank you.

ATTORNEY BARMAK: Thank you, your Honor.

ATTORNEY KAPLAN: Thank you.

CERTIFICATE

I, MICHAEL A. RODRIQUEZ, an Official Court Reporter for the United States District Court, in the Eastern District of Virginia, Alexandria Division, do hereby certify that I reported by machine shorthand, in my official capacity, the proceedings had upon the motions hearing in the case of PATRICIA VILLA v. CAVAMEZZE GRILL, LLC et al.

I further certify that I was authorized and did report by stenotype the proceedings in said motions hearing, and that the foregoing pages, numbered 1 to 27, inclusive, constitute the official transcript of said proceedings as taken from my machine shorthand notes.

IN WITNESS WHEREOF, I have hereto subscribed my name this 27th day of April, 2016.

/s/
Michael A. Rodriquez, RPR/CM/RMR
Official Court Reporter